Nos. 88-805, 88-1125, 88-1309

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF OHIO,
Appellant,
v.
AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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JANE HODGSON, M.D., *et al.*,
Petitioners,
v.
THE STATE OF MINNESOTA, *et al.*,
Respondents.

THE STATE OF MINNESOTA, *et al.*,
Cross-Petitioners,
v.
JANE HODGSON, M.D., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT IN NO. 88-805, AND RESPONDENTS-CROSS-PETITIONERS IN NOS. 88-1125 AND 88-1309

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INTEREST OF THE *AMICUS*

Amicus curiae Knights of Columbus is an international organization of 1.4 million members. It has a long history of pro-family advocacy. For example, *amicus* underwrote the litigation in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). Moreover, a large percentage of its members are themselves parents. Because of its institutional interest, and the interests of its members, *amicus* believes that it can assist the Court by analyzing the impact of the present cases on the broader area of family rights generally. For these same reasons, *amicus* does not believe its interests will be fully attended to by existing parties. All parties have consented to the filing of this brief.

STATEMENT

In *Akron Center for Reproductive Health* v. *Slaby*, 854 F.2d 852 (6th Cir. 1988), and *Hodgson* v. *Minnesota*, 853 F.2d 1452 (8th Cir. 1988) (*en banc*), the United States Courts of Appeals for the Sixth and Eighth Circuits have held that states may not require that the parents of adolescent girls be notified prior to their daughters' obtaining abortions, unless states provide a so-called "judicial bypass" procedure enabling a judge to determine that the girl is mature enough to decide to have an abortion without telling her parents, or that an abortion is in her best interests. As the Eighth Circuit explained, "[i]n view of the unique nature and consequences of the abortion decision, states do not have the constitutional authority 'to give a third party an absolute, and possibly arbitrary, veto,' over the minor's abortion decision." *Hodgson*, 853 F.2d at 1456, *quoting Bellotti* v. *Baird*, 443 U.S. 622, 643 (1979) (plurality opinion). *See also Akron Center for Reproductive Health*, 854 F.2d at 861 ("we hold that a parental notification statute must provide a bypass procedure that is consistent with the dictates of *Bellotti II*"). The Eighth Circuit upheld Minnesota's parental notification statute, provided that its judicial bypass pro-

cedure remains in force. The Sixth Circuit struck down Ohio's statute largely because that court thought the judicial bypass provision inadequate. *Amicus* argues that no "judicial bypass" provision is ever constitutionally required, and thus urges this Court to affirm the Eighth Circuit, except insofar as it found the bypass provision necessary, and to reverse the Sixth Circuit.

SUMMARY OF ARGUMENT

In a nearly unbroken tradition, stretching back to the received English common law, courts and legislatures have recognized that parental authority is not delegated by the state, but rather inheres in the nature of parenthood. Thus, many "fundamental" rights of children have been conditioned on their parents' consent. Children may not marry without their parents' consent. Their interstate travel is largely conditioned on their parents' consent. And their right to enter into contracts is also restricted, and often conditioned on their parents' consent. In a line of cases beginning with *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), this Court has repeatedly emphasized the same principle. Thus, it has insisted that "[t]he child is not the mere creature of the State," but on the contrary, his parents "have the right coupled with the high duty" to direct his education. *Id.* at 535.

Planned Parenthood of Central Missouri v. *Danforth*, 428 U.S. 52 (1976), and the cases following it, are incompatible with the *Pierce* line of cases, and with the long-standing tradition of legislative and common-law recognition of inherent parental authority. Most fundamentally, *Danforth* and its progeny err in asserting that the only authority that parents have over their children's abortions is whatever the state is permitted to delegate to them. Parental authority is most emphatically not the product of state delegation, but of nature itself. The lower courts' decisions in these cases further extending *Danforth*'s reasoning to parental notification stat-

utes, like *Danforth* itself, are symptomatic of *Roe* v. *Wade*'s noted tendency for sudden displacement of time-honroed doctrines, and are thus symptomatic of *Roe*'s flawed nature. *Danforth* and its progeny, and *Roe* itself, should be reconsidered and overruled.

ARGUMENT

There is a nearly unbroken legal tradition, Constitutional, legislative and common-law, that the family has its "origins entirely apart from the power of the State." *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 845 (1977). Familial rights are therefore grounded "not in state law, but in *intrinsic* human rights, as they have been understood in 'this Nation's history and tradition.'" *Ibid.* (emphasis added; citations omitted). The family, in short, is logically prior to the State.[1]

That principle has often been codified in legislation recognizing and reinforcing parental authority. Thus, for example, childrens' rights to marry, to travel, and to make certain contracts are conditioned on their parents' consent. With the sole—and rather conspicuous—exceptions of *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), and its progeny, this tradition of family autonomy has been nowhere more forcefully expressed than in the precedents of this Court. *Amicus* respectfully urges the Court to resolve the dissonance created in the law by *Danforth* and *Bellotti* v. *Baird*, 443 U.S. 622 (1979), by restating in this case its long-standing theme of familial autonomy.

[1] Cf. Hobbes, *Leviathan*, ch. xxii (Fuller, ed 1952) ("For the father and master being before the institution of the Commonwealth absolute sovereigns in their own families, they lose afterward no more of their authority than the law of the Commonwealth taketh from them"); Locke, *Concerning Civil Government*, ch. VI, par. 58 (Brit. ed. 1952) ("The power, then, that parents have over their childen arises from that duty which is incumbent upon them, to take care of their offspring during the imperfect state of childhood").

I. THERE IS A LONG LEGISLATIVE AND COMMON-LAW TRADITION RECOGNIZING AND REINFORCING PARENTAL AUTHORITY.

Through both legislation and common law, both the federal government and the States have long acknowledged parents' authority by requiring their consent for important decisions made by their children.

A. Marriage

The most obvious example is marriage. It is a "fundamental right," *Loving* v. *Virginia*, 388 U.S. 1 (1967), and cannot be denied even to prisoners. *Turner* v. *Safley*, 107 S.Ct. 2254 (1987). Yet the requirement that a child obtain the consent of his or her parents before marrying has remained in force ever since its origins in the English common law.

Blackstone explains that the requirement was designed to reinforce a parent's natural duty:

> [t]he consent or concurrence of the parent to the marriage of his child under age, was . . . directed by our ancient law to be obtained: but now it is absolutely necessary; for without it the contract is void. And this also is *another means, which the law has put into the parents' hands, in order the better to discharge his duty;* first, of protecting his children from the snares of artful and designing persons; and, next, of settling them properly in life, by preventing the ill consequences of too early and precipitate marriages.

Blackstone's Commentaries, Book 1, Chap. XVI, par. 2 (Oxford 1966) (emphasis added; original emphasis omitted). In 1753, the rule was codified in "An Act for the better prevention of clandestine marriages," which required the consent of a parent or guardian in order for a person under twenty-one to marry.[2] Interestingly,

[2] The statute provided, in relevant part, as follows: "And it is hereby further enacted, That all Marriages solemnized by License,

that statute allowed for the Chancellor or other officials to approve a "proper" marriage if a party's parent or guardian had been "induced unreasonably . . . to abuse the Truth reposed in him" and to withhold consent. It did *not*, however, provide for application to them in the first instance. And it certainly did not create a mechanism for them to supply their own consent in secret, without the parents' knowledge.

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after the said twenty-fifth Day of *March*, one thousand seven hundred and fifty-four, where either of the Parties, not being a Widower or Widow, shall be under the Age of twenty-one Years, which shall be had without the Consent of the Father of such of the Parties, . . . or if dead, of the Guardian or Guardians . . . and in case there shall be no such Guardian or Guardians, then of the Mother (if living and unmarried) or if there shall be no Mother living and unmarried, then of a Guardian or Guardians of the Person appointed by the Court of *Chancery*; shall be absolutely null and void to all Intents and Purposes whatsoever. XII. And whereas it may happen, that the Guardian or Guardians, Mother or Mothers, of the Parties to be married, or one of them, so under Age as aforesaid, may be *Non compos mentis*, or may be in Part beyond the Seas, or may be induced unreasonably, and by undue Motives to abuse the Truth reposed in him, her or them by refusing or withholding his, her or their Consent to a proper Marriage; Be it therefore enacted, That in case any such Guardian or Guardians, Mother or Mothers, or any of them, whose Consent is made necessary as aforesaid, shall be *Non compos mentis*, or in Parts beyond the Seas, or shall refuse or with-hold his, her or their Consent to the Marriage of any Person, it shall and may be lawful for any Person desirous of marrying, in any of the before-mentioned Cases, to apply by Petition to the Lord Chancellor, Lord Keeper, or the Lords Commissioners of the Great Seal of *Great Britain* for the Time being, who is and are hereby empowered to proceed upon such Petition, in a summary Way; and in case the Marriage proposed, shall upon Examination appear to be proper, the said Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal for the Time being, shall judicially declare the same to be so by an Order of Court, and such Order shall be deemed and taken to be as good and effectual to all Intents and Purposes, as if the Guardian or Guardians, or Mother of the Person so petitioning, had consented to such Marriage. Lord Hardwicke's Act, 1753, 26 Geo. 2. ch. 33.

All 50 States and the District of Columbia still require parental consent for children to marry.[3] Only 5 states

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[3] Twenty-seven States and the District of Columbia simply require parental consent. *See* Ala. Code § 30-1-5 (1983); Ark. Stat. Ann. § 9-11-102-105 (1987); Cal. Civ. Code § 4101 (West 1983); Del. Code Ann. Tit. 13, § 123 (1981); D.C. Code Ann. § 30-110 (1988); Fla. Stat. Ann. 741.04-0405 (West 1986); Ga. Code Ann. § 19-3-2 (1982); Ill. Ann. Stat. ch. 40, para. 203 (Smith-Hurd 1982); Iowa Code § 595.2 (1980 & Supp. 1989); Ky. Rev. Stat. § 402.210 (1988); La. Rev. Stat. Ann. § 9:211 (Supp. 1989); Md. Fam. Law Code Ann. § 2-301 [b] (1984 & Supp. 1988); Mich. Comp. Laws Ann. 551.51 (West 1988); Miss. Code Ann. § 93-1-5 (1972 & Supp. 1988); Mo. Ann. Stat. 451.090 (Vernon 1986); Neb. Rev. Stat. § 42-105 (1988); N.C. Gen. Stat. § 51-2 (1988 & Supp. 1988); N.D. Cent. Code § 14-03-02, 14-17 (1981 & Supp. 1989); Ohio Rev. Code Ann. § 3101.01 (Baldwin 1984); Okla. Stat. Ann. tit. 43 § 3 (West 1979); Or. Rev. Stat. § 106.060 (1983 & Supp. 1988); S.C. Code Ann. § 20-1-260—270 (Law. Co-op. 1985); S.D. Codified Laws Ann. § 25-1-12, 13; Utah Code Ann. § 30-1-2 (1989); Va. Code Ann. § 20-48, 49 (1989); Wash. Code § 26.04.010 (1988); Wis. Stat. Ann. § 765.02[1] (West 1981 & Supp. 1988); Wyo. Stat. 20-1-102 (1987). Eighteen states require a court's consent, in *addition* to parents' consent, in certain circumstances. For example, in New York an 18-year old may not marry without his or her parent's consent, but a 16-year old may not marry without *both* the consent of his or her parent's *and* that of a state superior court or family court judge. *See* N.Y. Dom. Rel. Law § 15 (McKinney 1988); *see also* Ariz. Rev. Stat. Ann. § 25-102 (1976) (same); Colo. Rev. Stat. § 14-2-106[1][a][I]108 (1987) (same); Conn. Gen. Stat. Ann. § 46b-30 (West 1986) (same); Haw. Rev. Stat. §§ 572-1-2 (1985) (same); Idaho Code § 32-202 (1979) (minors under 18 require parental consent; girls under 16 also require consent of probate court); Ind. Code Ann. §§ 31-7-1-6, 31-7-1-7, 31-7-2 (Burns 1980 & Supp. 1986) (minors between 17 and 18 may marry without parental consent; girl under 15 who is pregnant or has given birth may marry with parental consent and judicial approval); Kan. Stat. Ann. § 23-106 (1988) (both parents' and court's consent required for minors under 18); Me. Rev. Stat. Ann. Tit. 19, § 62 (1981 & Supp. 1988) (minors under 18 require parental consent; minors under 16 also require consent of probate court); Minn. Stat. § 517.02 (1969 & Supp. 1989) (minors under 16 require both consent of parents' and consent of juvenile court); Mont. Code Ann. § 40-1-213 (1989) (minors under 18 require parental consent;

permit a court to consent in lieu of the parents, thus effectively emancipating the minor.[4] None, however, requires such a hearing to be conducted secretly from the parents.

B. Travel

A child's right to interstate travel, which is also a fundamental right, *Shapiro* v. *Thompson*, 394 U.S. 618

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minors under 16 require both parental and consent of district court judge); Nev. Rev. Stat. § 122.020 (1985) (same); N.J. Stat. Ann. §§ 37.1, 37.6 (West 1986 & Supp. 1989) (same); N.M. Stat. Ann. §§ 40-1-5, 40-1-6 (1987) (same); Pa. Stat. Ann. Tit. 48 § 1-5 (Purdon 1965 & Supp. 1989) (same); R.I. Gen. Laws § 15-2-11 (1989) (same); Vt. Stat. Ann. Tit. 18 § 5142 (1981) (same); West Va. Code § 48-1-1 (1988) (same). Five states require parental *or* judicial consent. *See infra*, n.4.

[4] Alaska Stat. § 25.05.171 (1988) (minors between 16 and 18 require parental consent; minors between 14 and 18 may receive court approval if marriage is "in best interest" of minor, and parents either have consented or unreasonably refused consent); Mass. Gen. Laws Ann. ch. 207, §§ 7, 24, 25 (West 1987 & Supp. 1989) (minors under 18 require parental consent; court may waive requirement under specified circumstances); N.H. Rev. Stat. Ann. § 457 (1983 & Supp. 1988) (marriage by minors under 18 prohibited; court may waive disability for boys over 14 girls over 13 in its discretion); Tenn. Code Ann. § 36-3-107 (1984 & Supp. 1988) (minors between 16 and 18 can marry with parental consent, but court may waive disability "upon good cause shown"); Texas Fam. Code Ann. §§ 1.51-1.53 (Vernon 1975 & Supp. 1989) (minors under 18 require either parental consent or court order; minors under 14 require court order). Other states, however, permit judicial consent in the limited circumstances where the girl is pregnant. *See, e.g.*, Ohio Rev. Code Ann. § 3101.01 (Baldwin 1984) (minors under 18 require parental consent; court may consent when girl is pregnant); N.J. Stat. Ann. §§ 37.1, 37.6 (West 1986 & Supp. 1989) (parental consent required for minors under 18; court consent also required for minors under 16; but both requirements waived where girl pregnant); Ky. Rev. Stat. 402.210 (1988) (parental consent required for minors under 18; district court may waive consent requirement, in its discretion, in case of pregnant girl).

(1969), is likewise largely conditioned on his or her parents' consent. Forty-six states and the District of Columbia have enacted the Uniform Interstate Compact on Juveniles,[5] which provides rather elaborate procedures

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[5] *See* Ala Code §§ 44-2-1—44-2-7 (1987); Alaska Stat. §§ 47.15.010—47.15.080 (1988); Ariz. Rev. Stat. Ann. §§ 8-361—8-367 (1989); Ark Stat. Ann. §§ 9-29-101—9-29-108 (1987 & Supp. 1987); Cal Welf. & Inst. Code § 1300 (West 1984 & Supp. 1989); Colo. Rev. Stat. §§ 24-60-701-708 (1988); Conn. Gen. Stat. Ann. §§ 17-15—77-81 (West 1988 & Supp. 1979); Del. Code Ann. Tit. 31, §§ 5203, 5221—5228 (1985); D.C. Code Ann. §§ 32-1101—32-1106 (1988); Fla. Stat. Ann. §§ 39.51—39.516 (West 1988); Ga. Code Ann. §§ 39-3-1—39-3-7 (1982); Haw. Rev. Stat. §§ 582-1—582-8 (1985 & Supp. 1988); Idaho Code §§ 16-1901—16-1910 (1979); Ill. Rev. Stat. ch. ¶¶ 2591—2597 (Smith-Hurd 1988); Iowa Code § 232.171-72 (1980 & Supp. 1989); Ind. Code Ann. §§ 31-6-10-1—31-6-4 (West 1979 & Supp. 1989); Kan. Stat. Ann. § 38-1001 (1986); Ky. (K.R.S. 208.600, 208.670); La. Rev. Stat. Ann. §§ 46:1451—46:1458 (West 1982 & Supp. 1989); Me. Rev. Stat. Ann. Tit. 34-A, §§ 9001—9016 (1988 & Supp. 1989); Md. Health-General Code Ann. §§ 6-301—6-310 (1982 & Supp. 1989); Mass. Gen. Laws Ann. ch. 119 App., §§ 1-1—1-7 (West 1969 & Supp. 1989); Mich. Comp. Laws Ann. §§ 3.701—3.706 (West 1982 & Supp. 1989); Minn. Stat. Ann. §§ 260.51—260.57 (West 1981 & Supp. 1989); Miss. Code Ann. §§ 43-25-1—43-25-17 (1981); Mo. Ann. Stat. §§ 210.570—210.600 (Vernon 1983 & Supp. 1989); Mont. Code Ann. §§ 41-6-101—41-6-106 (1989); Neb. Rev. Stat. §§ 43-1001—43-1009 (1989); Nev. Rev. Stat. §§ 214.010—214.060 (1985); N.H. Rev. Stat. Ann. § 169-A:1-9 (1983 & Supp. 1988); N.J. Stat. Ann. §§ 9.23-1—4 (West 1968 & Supp. 1989); N.M. Stat. Ann. 32-3-1—32-3-8 (1978); N.Y. Unconsul. Law §§ 1801—1806 (1979 & Supp. 1989); N.C. Gen. Stat. §§ 110-58—110-64 (1988) Repealed by Session Laws 1979, C 815 S.2, 1180 §§ 7A-684 to 7A-711 (1988); N.D. Cent. Code §§ 27-22-01—27-22-06 (1974 & Supp. 1989); Ohio Rev. Code Ann. §§ 2151.56—2156.61 (Baldwin 1989); Okla. Stat. Ann. Tit. 10, §§ 531—537 (West 1987 & Supp. 1989); Or. Rev. Stat. §§ 417.01—417.080 (1987); Pa. Stat. Ann. Tit. 62 § 731 (1968 & Supp. 1989.; R.I. Gen. Laws §§ 14-6-1—14-6-11 (1989); S.C. Code Ann. § 27-17-10 (1976); S.D. Codified Laws Ann. §§ 26-12-1—26-12-13 (1984 & Supp. 1989); Tenn. Code Ann. § 37-801—37-

for a "parent . . . entitled to legal custody of a juvenile . . . who has run away without the consent of such parent" to petition a state court for a "requisition" securing the minor's return from the state to which he or she has fled. *See, e.g.*, D.C. Code § 32-1102, Art. IV(a) (1988). A child's freedom to leave the country is similarly conditioned.[6] Thus, passport officers may require children under 18 to obtain the consent of a parent or guardian before issuing them a United States passpost. 22 C.F.R. § 51.27 (1988).

C. Contract

The right to enter into contracts—one of the basic rights guaranteed by 42 U.S.C. § 1981—is generally either effectively denied to children (the traditional rule), or else is conditioned on their parents' consent. *See, e.g.*, Cal. Ins. Code § 10-112 (Deering 1989) (requiring parental consent for minors to enter into certain insurance contracts); 18 Del. Code § 2707 (1988) (same). *See generally*, 2 Williston, *Contracts* §§ 222-248 (3d ed. 1959 & Supp. 1989) (discussing "infants'" lack of capacity to contract); Restatement (2d) Contracts, §§ 6, 14 (1981) (same). The federal government likewise requires parental consent before allowing minors to enlist in the military or join R.O.T.C. *See* 10 U.S.C. §§ 505(a), 2104 (b)(4), 2107(b)(4), 2107a(b)(4) (1982).

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806 (1984 & Supp. 1988); Texas Fam. Code Ann. §§ 25.01-09 (Vernon 1986); Utah Code Ann. §§ 55-12-1—55-12-6 (1986); Vt. Stat. Ann. Tit. 33 § 551—575 (1981 & Supp. 1988); Va. Code Ann. §§ 16.1-323—16.1-330 (1988); Wash. Rev. Code Ann. §§ 13.24.010—13.24.900 (1962 & Supp. 1989). The exceptions are North Carolina, West Virginia, Wisconsin and Wyoming.

[6] The ability to travel out of the country, while not a "right," is nonetheless a constitutionally-protected "freedom." *Haig* v. *Agee*, 453 U.S. 280, 306-307 (1981).

These restrictions, and others like them,[7] are not isolated oddities. Rather, they embody a fundamental tenet of the American legal tradition, namely that parents have natural authority over their children, which the law recognizes and reinforces.[8]

II. THIS COURT HAS LONG RECOGNIZED THAT PARENTAL AUTHORITY IS AFFIRMATIVELY PROTECTED BY THE CONSTITUTION.

Apart from *Danforth* and its progeny, these same principles of family autonomy and parental authority have been repeated time and again in the precedents of this Court. Faced with a state statute that required all children to attend public schools, this Court insisted that

> [t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instructions from public teachers only. *The child is not the mere creature of the State; those who nurture him and direct his destiny have the right coupled with the high duty, to . . . prepare him for* [*his*] *additional obligations.*

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[7] Many restrictions on children are quite mundane. *See, e.g.*, Cal. Bus. & Prof. Code § 22-706 (Deering 1989) (requiring parental consent for use by children under 18 of "tanning devices").

[8] This same vision of family and state is apparent in the debates surrounding the Thirteenth and Fourteenth Amendments. The abolitionists argued that the natural evils of slavery the law had to remedy were not limited to involuntary servitude; slavery also caused the slave's "authority and responsibility to rear his children [to be] obliterated. The members of his family might be torn from him and scattered." J. TenBroek, *The Antislavery Origins of the Fourteenth Amendment* 122 (1951); Likewise, Senator Harlan, arguing in favor of the Thirteenth Amendment, noted that one of the evils of slavery was the "abolition practically of parental relation, [thus] robbing the off-spring of the care and attention of his parents." Cong. Globe, 38th Cong., 1st Sess. 1439 (1864). Senator Wilson agreed. He thought the Thirteenth Amendment necessary, in part, because "[t]hen the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law . . . ." *Id.* at 1324.

Pierce v. *Society of Sisters*, 268 U.S. 510, 535 (1925) (emphasis added). *See also Michael H.* v. *Gerald D.*, 109 S.Ct. 2333, 2342 (1989) (plurality opinion) ("'the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition'") (citation omitted). Earlier, in *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923), the Court struck down a statute that purported to criminalize instructing children in foreign languages. The Court noted that "[c]orresponding to the right of control, it is the natural duty of the parent to give his children education. . . ." *Id.* at 400. The statute, the Court inferred "with the power of parents to control the education of their own." *Id.* at 401.

The Court enforced the same principle, under the aegis of the Free Exercise Clause, in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). There, the Court held that a state could not require Amish children, against their parents' wishes, to attend high school. Reiterating its insistence that "[t]he child is not the mere creature of the State," *id.* at 233 (*quoting Pierce*, 268 U.S. at 535), the *Yoder* Court rejected the state's argument that it should be permitted to determine what type of education best served the Amish children. "[I]t seems clear that if the State is empowered as *parens patriae*, to 'save' a child from . . . his Amish parents . . . the State will in large measure influence, if not determine, the religious future of the child." 406 U.S. at 232. And that, the Court insisted, was well beyond the pale, since the "primary role of the parents in the upbringing of their children is now established beyond doubt. . . ." *Ibid.*

The *Yoder* Court reserved the question of how it would balance a state's right as *parens patriae* with the rights of parents and children in a hypothetical case where Amish children wished to obey a compulsory education statute against their parents' wishes. *Id.* at 231. Nevertheless, the Court warned "that such an intrusion by a State into family decisions . . . would give rise to grave questions of religious freedom comparable to those raised

here and those presented in *Pierce*. . . ." *Id.* at 231-32 (citation omitted). Six years later, in *Parham* v. *J.R.*, 442 U.S. 584 (1979), the Court went far towards resolving even that question.

In *Parham*, this Court upheld a state statute that authorized state mental institutions to admit temporarily any minor merely upon the application of that minor's parents or guardians. If, after observation, the institution found evidence of mental illness, it was authorized to admit the minor "for such period and under such conditions as may be authorized by law." 442 U.S. at 591. Any child hospitalized for more than five days, however, could always be discharged simply upon the request of his or her parents. *Ibid.* Several institutionalized children filed a class action challenging the statute as a deprivation of liberty without Due Process. They argued that "the likelihood of parental abuse" in having them committed against their will required a formal adversarial hearing. 442 U.S. at 603.

In rejecting that argument, this Court stressed once again that "our constitutional system long ago rejected any notion that a child is 'the mere creature of the State'. . . ." 42 U.S. at 602, *quoting Pierce*, 268 U.S. at 535. On the contrary, the Court emphasized that its "jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children." *Ibid.* Thus, an independent evaluation of the child by a staff physician at the hospital was all that due process required. *Id.* at 607.[9] The Court dismissed the argument that, because of the risk that some parents would abuse their children, a more formal procedure was necessary. "The statist notion that

[9] If the person to be committed were an adult instead of a minor, Due Process would require a full-scale adversary hearing. *See* 442 U.S. at 627 (Brennan, J., concurring and dissenting); *see* also *O'Connor* v. *Donaldson*, 442 U.S. 563, 580 (1975) (Burger, C.J., concurring); *McNeil* v. *Director Patuxent Institution*, 407 U.S. 245 (1972).

governmental power should supercede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition." *Id.* at 603. The Court added it would not

> assume that the result in *Meyer* v. *Nebraska* . . . and *Pierce* v. *Society of Sisters* . . . would have been different if the children there had announced a preference to learn only English or a preference to go to a public, rather than a church, school.

Id. at 603-04 (emphasis omitted). In short, because the child is not "the creature of the State" his parents' authority over him does not derive from the State.

Of course, as this Court has stressed, the State can and should *reinforce* parental authority. In *Ginsberg* v. *New York*, 390 U.S. 629 (1968), the Court upheld a statute that prohibited sales, to persons under 17, of pictures that "depict[ed] nudity" and were "harmful to minors." *Id.* at 632. The Court held that a state could properly accommodate parental authority by applying to minors a different definition of obscenity than that applicable to adults. "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Id.* at 639. Thus a "legislature could properly conclude that parents . . . are entitled to the support of laws designed to aid discharge of that responsibility." *Ibid.* Indeed, the Court has even upheld provisions giving parents complete discretion over what *non-obscene* sexual material may be delivered to their minor children. In *Rowan* v. *Post Office Dep't.*, 397 U.S. 728 (1970), it upheld a federal statute giving parents the right to have both their names and the names of their resident children under 19 deleted from mailing lists for material the parents judged to be "erotically arousing or sexually provocative." [10]

[10] Concurring, Justices Brennan and Douglas would have reserved the question of the constitutionality of applying the statute to all minors under nineteen. See 397 U.S. at 741 (Brennan, J., concurring).

The above cases all stand for the proposition that parental authority should not be invaded by the state, but instead ought affirmatively to be reinforced by it. None of those cases anywhere suggests that the state must create special mechanisms to "bypass" a child's parents without notice to the parents themselves.

Quite the contrary, where this Court *has* required judicial intervention is in cases where the state seeks to *terminate* parents' rights. Thus, the state may not remove a child from his or her parents, except upon notice and hearing. *Santosky* v. *Kramer*, 455 U.S. 745 (1982). And even then the state's case must meet the "clear and convincing" standard of proof. *Ibid.* Indeed, so profound is a parent's right to raise his or her children that a state may not terminate the parental rights of even certain unwed fathers except after notice and an adversary hearing. In *Stanley* v. *Illinois*, 405 U.S. 645 (1972), the Court mandated a hearing on the fitness of a resident, but unwed, father before the state could take custody of his children following their mother's death. "It is cardinal with us," the Court repeated, "that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." 405 U.S. at 651, *quoting Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944) (emphasis added). *See Michael H.* v. *Gerald D.*, 109 S.Ct. 2333, 2342 (1989) (plurality opinion) (*Stanley* line of cases rests "upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family") (footnote omitted).

III. *DANFORTH* AND *BELLOTTI II*—AS WELL AS *ROE*—ARE ABERRATIONS IN THE LAW, AND SHOULD BE REPUDIATED

Danforth and its progency are at odds with both the *Pierce* and the *Santosky* lines of cases. *Danforth* and *Bellotti II* forbid a state to accommodate parents' authority over their daughters' abortions, unless the state simultaneously provides for an *ex parte*—indeed affirmatively secret—proceeding to "bypass" the rights of the parents involved. This departure from an otherwise-settled tradition of protecting family autonomy is all the more remarkable because it was accomplished with so little fanfare.

A. *Danforth* And *Bellotti II* Are Incompatible With The *Pierce* Line Of Cases.

In *Danforth*, the Court struck down, among other things, a Missouri statute that required an adolescent to obtain her parents' consent before having an abortion. Writing for the majority, Justice Blackmun alluded only briefly to the *Pierce* line of cases and the fact that the lower court had upheld the parental consent requirement at issue as justified by the state's interest "in safeguarding the authority of the family relationship." 428 U.S. at 73. The *Danforth* majority then struck down that requirement by announcing simply that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy. . . ." *Id.* at 74. Earlier in its opinion, the majority elaborated on why it thought that was so. Discussing a spousal consent requirement, which it also invalidated, the majority announced that "since the State cannot regulate or proscribe abortion during the first stage . . . the State cannot delegate authority to any particular person . . . to prevent abortion during that same period." *Id.* at 69. The majority also did not feel that allowing parents to "overrule" a decision "made by the

physician and his minor patient" would "serve to strengthen the family unit." *Id.* at 75. Nor did the majority think that it would "enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict . . . ." *Ibid.*

Bellotti v. *Baird*, 443 U.S. 622 (1979) ("*Bellotti II*"),[11] followed *Danforth* and struck down a Massachusetts statute which, as construed, required a minor seeking an abortion to first attempt to get her parents' consent. Failing that, she could still have an abortion if she persuaded a state court judge that the abortion was in her best interests.

The *Bellotti II* plurality struck down those provisions because they "g[a]ve a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy. . . ." 443 U.S. at 643, quoting *Danforth*, 428 U.S. at 74. The plurality then announced that a parental consent requirement would only be constitutional if the minor had the opportunity (1) to substitute a judge's idea of her best interest for that of her parents, or else, (2) to convince the judge that she was mature enough to make the decision on her own even if the judge thought it against her best interest. 443 U.S. at 643-44. The plurality stressed that "every minor must have the opportunity . . . to go directly to a court *without first consulting or notifying her parents.*" *Id.* at 647 (emphasis added). And if that court then determines "that she is mature and well enough informed to make intelligently the abortion decision on her own, the court *must authorize her to act without parental consultation* or consent." *Ibid.* (Emphasis added).

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[11] In *Bellotti* v. *Baird*, 428 U.S. 132 (1976) ("*Bellotti I*"), the Court vacated an earlier opinion of the district court, and remanded it to that court for certification of several questions of construction to the Supreme Judicial Court of Massachusetts.

Unlike the *Danforth* majority, the *Bellotti II* plurality paid somewhat more attention to the traditional protection afforded to parental authority. Nevertheless, the plurality said *Pierce* and its progeny were distinguishable because "[t]he abortion decision differs in important ways from other decisions that may be made during minority." 443 U.S. at 642. The plurality reasoned that "[a] minor not permitted to marry before the age of majority is required simply to postpone her decision . . . a pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy." *Ibid.*[12]

At bottom, therefore, *Danforth* and *Bellotti II* justified their departure from the Court's longstanding protection of family autonomy with three arguments: (1) that bearing a child is a decision with implications more profound and more urgent than those of other decisions traditionally conditioned on parental consent, (2) that the state's interest in safeguarding parental authority would not be promoted when the parents and child are "fundamentally in conflict" over the child's desire to have an abortion, and (3) that the state may not *delegate* a right of consent to parents, because the state itself has no such right to give. None of these arguments compels *Danforth*'s conclusion.

1. To be sure, bearing a child has profound consequences for an unwed adolescent. It is, however, quite debatable whether those consequences are necessarily more profound than those of other decisions subject to parental control—whether or whom to marry for example.[13] And the fact that a girl's unwed pregnancy may be a predicament more urgent than others hardly proves that a judge, who presumably has never met her before, is better capable of assisting her in facing it than her parents would be.

In short, neither the importance nor the urgency of a girl's pregnancy supports the notion that parents should be kept in ignorance of it. To the contrary, that a girl's decision to have an abortion will have so profound an impact on her, and that it may be influenced by the pressure of time and other practical considerations, only underscore the value of her parents' involvement.[14]

2. The Court suggested in Danforth that recognizing parents' right to "veto" their child's decision to have an abortion would not "enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the

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[12] *Danforth*'s reach, of course, extends beyond *Bellotti II*. *See Planned Parenthood Ass'n of Kansas City* v. *Ashcroft*, 462 U.S. 476, 490-93 (1983); *Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 439-42 (1983); *H. L.* v. *Matheson*, 450 U.S. 398 (1981). *See also Zbaraz* v. *Hartigan*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by an equally divided Court*, 108 S.Ct. 479 (1987) (requiring judicial bypass for parental notification statute).

[13] It is not only difficult, but probably fruitless, to guess whether a marriage or an unwed pregnancy, by itself, would have the greater impact on a child's future. For it is surely the entirety of *childhood*, an entirety not separable into discrete decisions amenable to one-at-a-time judicial proceedings, that has the greatest lifelong consequences.

> *To safeguard the right of parents* to raise their children as they see fit, free of government intrusion, except in cases of neglect and abandonment, *is to safeguard each child's need for continuity.* This preference for minimum state intervention and for leaving well enough alone is reinforced by our recognition that *law is incapable of effectively managing, except in a very gross sense, so delicate and complex a relationship* as that between parent and child.

J. Goldstein, A. Freud & A. Solnit, *Beyond The Best Interests Of The Child* 13 (1973) (emphasis added). Cf. *Parham*, 442 U.S. at 504 ("Neither state officials nor federal courts are equipped to review such parental decisions").

[14] *Danforth* seems to presume that an adolescent will suffer adverse consequences only if she proceeds to bear her child. But abortion itself has adverse consequences, and the girl may live profoundly to regret that choice.

pregnancy has already fractured the family structure." 428 U.S. at 75. But there is no reason to assume that the family structure has been "fractured" whenever an adolescent wishes to conceal her pregnancy from her parents. That, no doubt, is the initial reaction of virtually every adolescent who becomes pregnant. Nor does the fact that the parents and their daughter are "in conflict" mean that the State's interest in reinforcing parental authority is somehow diminished. Parents and their children disagree all the time, and it is precisely when they do that parental authority is ordinarily exercised.

3. Most fundamentally, the *Danforth* majority misapprehended the source of parents' rights. It announced that the state cannot "give" to parents a right that it itself does not have—the right to "overrule a determination made by a physician and his minor patient." 428 U.S. at 75. Implicit in that statement is the notion that parents have only such authority as the State gives them to act in its stead. But " 'the child is not the mere creature of the state.' " *Parham*, *supra*, 442 U.S. at 602, *quoting Pierce*, 268 U.S. at 510. And since the family has its "origins entirely apart from the power of the State," parents' rights have their source "not in state law, but in intrinsic human rights. . . ." *Smith*, *supra*, 431 U.S. at 845. Thus, parents require no special legislative grace in order to "claim . . . authority in their own household to direct the rearing of their children . . . ." *Ginsberg*, *supra*, 390 U.S. at 639. Quite the contrary, "[i]t is cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince*, *supra*, 321 U.S. at 166.

The statutes at issue in the present cases, like those limiting childrens' rights to marry, to travel, etc., thus do not *delegate* anything. Rather, they recognize and reinforce the natural authority of parents over their children.

Parental authority is affirmatively undermined by the requirement, which both lower courts said they found in the Constitution, of a "judicial bypass" procedure for hiding childrens' abortions from their parents. That "requirement," as well as *Danforth* and *Bellotti II*, on which it rests, should be seen as the radical departure from constitutional, common-law and legislative tradition that it is. Cf. *Bellotti II*, 443 U.S. at 657 (White, J., dissenting) ("Until now, I would have thought inconceivable a holding that the United States Constitution forbids even notice to parents when their minor child who seeks surgery objects to such notice and is able to convince a judge that the parents should be denied participation in the decision.").

As Justice Harlan once noted, protected liberties are defined

> in the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.

Poe v. *Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). *Danforth* and its progeny constitute just such a departure from a long tradition of protecting family autonomy.

B. The Lower Courts' Decisions Highlight The Flaws In *Roe*.

Amicus recognizes that a majority of the Court in *Webster* v. *Reproductive Health Services*, 109 S.Ct. 3040 (1989), did not believe a full-dress reconsideration of *Roe* v. *Wade*, 410 U.S. 113 (1973), was in order until the Court was presented with a starker conflict with its

holding. *Amicus* nonetheless respectfully suggests that the lower court decisions in this case are so symptomatic of much that is wrong with *Roe* that the Court should take this opportunity to reconsider it.

The decisions of the lower courts in these cases, and *Danforth* and *Bellotti II*, which underlie them, rest on the proposition that there is a constitutional right to abortion sufficiently "unique" to justify departing from the Court's traditional approach to parents' rights. See, *e.g.*, *Hodgson*, 853 F.2d at 1456.[15] That a right to abortion is claimed to be unique in this area of constitutional law—as it is said to be in so many others—demonstrates once again that it does not fit naturally anywhere in the Constitution. Established rules must always be changed to explain its presence. It is "painfully clear that no legal rule or doctrine is safe from *ad hoc* nullification . . . where an occasion for its application arises in a case involving state regulation of abortion." *Thornburgh* v. *American College of Obst. & Gyn.*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting). The result is that *Roe*'s "scheme for constitutionalizing the regulation of abortion has had [an] institutionally debiliating effect" on the law. *Ibid.* The present case provides the Court with an example of that debilitating effect in the context of over two centuries of family law. Overruling *Danforth* and *Bellotti II* would go far toward resolving that particular anomaly, but a definitive resolution of all such anomalies can result only from overruling *Roe* itself. *Amicus* thus respectfully urges this Court to reconsider and overrule *Roe*, or, if it goes no further, to restore its traditional jurisprudence of respect for parents' rights and family autonomy by at least disavowing, if not overruling, *Danforth* and *Bellotti II*.

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[15] *Amicus*' submits that there is and can be no constitutional right to abortion. See Brief of Knights of Columbus, as *Amicus Curiae*, in *Webster* v. *Reproductive Health Services*, No. 88-605.

CONCLUSION

For the foregoing reasons, the judgment of the Eighth Circuit should be affirmed, except insofar as it held a "judicial bypass" to be constitutionally required. The judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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